

APPEAL NO. 172565
FILED DECEMBER 6, 2017

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on October 2, 2017, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issue by deciding that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the third quarter, March 15 through June 13, 2017.

The claimant appealed the ALJ's determination of non-entitlement to the third quarter of SIBs arguing that the evidence established that he demonstrated an active effort to obtain employment during each week of the qualifying period for the third quarter. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated, in part, that: (1) the claimant sustained a compensable injury on (date of injury), which resulted in an impairment rating (IR) of 15% or greater; (2) the claimant has not commuted any portion of the impairment income benefits; and (3) during the qualifying period for the third quarter of SIBs, the minimum number of job applications or work search contacts required for (county), the county of the claimant's residence, was five contacts per week.

We note that the ALJ, in her Decision and Order, incorrectly stated in Finding of Fact No. 1.A. that the parties stipulated that venue is proper in the (city) Field Office of the Texas Department of Insurance, Division of Workers' Compensation (Division). We accordingly reform Finding of Fact No. 1.A. to conform to the stipulation actually made by the parties on the record as follows:

A. Venue is proper in the (city) Field Office of the [Division].

We note further that the ALJ incorrectly stated in Finding of Fact No. 1.F. that the parties stipulated that the qualifying period for the third quarter of SIBs is from September 1 through November 30, 2016. We reform Finding of Fact No. 1.F. to conform to the stipulation actually made by the parties on the record as follows:

F. The qualifying period for the third quarter of [SIBs] is from December 1, 2016, through March 1, 2017.

It is undisputed that the claimant sustained a compensable injury on (date of injury), when the tractor-trailer he was driving was involved in a motor vehicle accident in which the driver of the other vehicle was killed. The claimant reached maximum medical improvement (MMI) on January 13, 2015, with regard to the compensable conditions of cervical strain, right shoulder strain, right hip strain and post-traumatic stress disorder and was assigned an IR of 29%. The claimant filed an Application for [SIBs] (DWC-52) on March 13, 2017, reflecting that he had made six job search contacts during each week of the qualifying period. The carrier disputed entitlement to SIBs for the third quarter on the grounds that the claimant's unemployment/underemployment was not a direct result of his impairment from the compensable injury.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142. Section 408.142 as amended by the 79th Legislature, effective September 1, 2005, references the requirements of Section 408.1415 regarding work search compliance standards. Section 408.1415(a) provides that the Division commissioner by rule shall adopt compliance standards that require each SIBs recipient to demonstrate an active effort to obtain employment. 28 TEX. ADMIN. CODE §§ 130.100-130.109 (Rules 130.100-130.109), effective July 1, 2009, govern the eligibility of SIBs.

Rule 130.102(d)(1) provides, in pertinent part, that an injured employee demonstrates an active effort to obtain employment by meeting at least one or any combination of the following work search requirements each week during the entire qualifying period:

- (A) has returned to work in a position which is commensurate with the injured employee's ability to work;
- (B) has actively participated in a vocational rehabilitation program as defined in [Rule] 130.101 of this title (relating to [d]efinitions);
- (C) has actively participated in work search efforts conducted through the Texas Workforce Commission (TWC);
- (D) has performed active work search efforts documented by job applications; or
- (E) has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work.

In her Finding of Fact No. 3.B., the ALJ stated:

- B. [The] [c]laimant did not demonstrate an active effort to obtain employment each week during the entire qualifying period by returning to work in a position commensurate with his ability to work.

We note from the record, however, that the claimant was unemployed during the qualifying period at issue and that his theory of entitlement to SIBs for the third quarter was not that he had returned to work in a position commensurate with his ability to work pursuant to Rule 130.102(d)(1)(A) but rather that he had performed work search efforts each week during the qualifying period in dispute pursuant to Rule 130.102(d)(1)(D). In the discussion section of her Decision and Order, the ALJ indicated that she actually based her decision that the claimant is not entitled to SIBs for the quarter at issue on her belief that the claimant conducted work search efforts for positions that were not within his work restrictions and that he was not capable of performing. Her basis for this finding is the July 25, 2017, report of (Dr. W), appointed by the Division as designated doctor for the purpose of determining the claimant's ability to return to work during the qualifying period for the third quarter of SIBs. In his report, Dr. W stated that the claimant could return to work and wrote further that "[t]he only [restriction] I would put is that the [claimant] cannot drive a commercial vehicle in his current state as he states he is a danger to other people." However, Dr. W provided no explanation regarding what he meant by the term "commercial vehicle." The claimant testified that he drives his personal pick-up truck around town and also drove himself 50 miles in order to attend the CCH but that he no longer possesses a commercial driver's license.

A review of the claimant's DWC-52 for the third quarter reveals that during the fifth week of the qualifying period (December 29, 2016, through January 4, 2017) he made six job search contacts, four of which contacts were for positions described as a warehouse delivery driver, a beverage company driver, a local pickup and delivery driver, and a commercial driver's license (CDL) driver. No evidence was offered regarding whether any of the vehicles which the claimant would have driven in performing the duties of the positions listed above would be considered a "commercial vehicle" or whether a CDL would be required to operate any of such vehicles. However, even if one were to assume that the position listed as CDL driver required operation of a "commercial vehicle" or possession of a commercial driver's license and discounted that work search contact, the claimant still documented the required number of job search contacts during the fifth week of the qualifying period. We hold that the ALJ erred in determining that the claimant documented only two work search efforts during the fifth week of the qualifying period which were within his work restrictions.

The ALJ's finding that the claimant did not demonstrate an active effort to obtain employment each week during the entire qualifying period for the third quarter of SIBs is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Accordingly, we reverse the ALJ's determination that the claimant is not entitled to SIBs for the third quarter, March 15 through June 13, 2017, and render a new decision that the claimant is entitled to SIBs for the third quarter, March 15 through June 13, 2017.

SUMMARY

We reform Finding of Fact No. 1.A. to state that venue is proper in the (city) Field Office of the Texas Department of Insurance, Division of Workers' Compensation.

We reform Finding of Fact No. 1.F. to state that the qualifying period for the third quarter of SIBs is from December 1, 2016, through March 1, 2017.

We reverse the ALJ's determination that the claimant is not entitled to SIBs for the third quarter, March 15 through June 13, 2017, and render a new decision that the claimant is entitled to SIBs for the third quarter, March 15 through June 13, 2017.

The true corporate name of the insurance carrier is **GREAT MIDWEST INSURANCE COMPANY** and the name and address of its registered agent for service of process is¹

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701.**

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge

¹ We note that the ALJ's decision recites an incorrect name and address of the registered agent for service. The insurance carrier information sheet in evidence contains the name and address listed above.

